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10/031,539	07/22/2002	Heinrich Gers-Barlag	Beiersdorf 759-HCL	6360
27386	7590	02/24/2006	EXAMINER	
NORRIS, MCLAUGHLIN & MARCUS, P.A. 875 THIRD AVE 18TH FLOOR NEW YORK, NY 10022			CHONG, YONG SOO	
			ART UNIT	PAPER NUMBER
			1617	

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/031,539
Filing Date: July 22, 2002
Appellant(s): GERS-BARLAG ET AL.

William C. Gerstenzang
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 1/13/2006 appealing from the Office action mailed 7/14/2005.

(1) *Real Party in Interest*

A statement identifying by name the real party in interest is contained in the brief.

(2) *Related Appeals and Interferences*

The examiner is not aware of any related appeals, interferences, or judicial proceedings, which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) *Status of Claims*

The statement of the status of claims contained in the brief is partially correct. The 35 USC 102(e) rejection has been withdrawn and claims 4-6 and 15 have been cancelled, thus the only remaining rejections are the 35 USC 103(a) rejections on claims 1-3, 7-14, and 16-20.

(4) *Status of Amendments After Final*

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

The amendment after final rejection filed on 9/23/2005 has not been entered.

(5) *Summary of Claimed Subject Matter*

The summary of claimed subject matter contained in the brief is correct.

(6) *Grounds of Rejection to be Reviewed on Appeal*

The appellant's statement of the grounds of rejection to be reviewed on appeal is partially correct. Applicant's arguments have been fully considered and found persuasive to withdraw the 35 USC 102(e) rejection only. The remaining rejections are the 35 USC 103(a) rejections on claims 1-3, 7-14, and 16-20.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

The following is a listing of the evidence (e.g., patents, publications, Official Notice, and admitted prior art) relied upon in the rejection of claims under appeal.

Gers-Barlag et al. (WO 98/42300)

Msika et al. (US Patent 5,939,054)

Plaschke et al. (US Patent 6,409,996 B1)

Suzuki et al. (US Patent 5,145,781)

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claims 1-5 and 7-12 are rejected under 35 U.S.C. 103(a) as being unpatentable over Gers-Barlag et al. (WO 98/42300) in view of Msika et al. (US Patent 5,939,054) and Plaschke et al. (US 6409996 B1).

Gers-Barlag et al. teach an emulsifier-free water-in-oil type cosmetic composition comprising an oil phase, a water phase, and one or more types of micronized, inorganic metal oxides having amphiphilic properties, and other cosmetic additives (abstract).

Gers-Barlag et al. fail to teach phyllosilicate and flavones, flavonoids, or flavanones. Msika et al. teach water-in-oil sunscreens comprising titanium and/or zinc oxide particles. The reference teaches that no additional emulsifiers are added (col. 2, lines 1-9). The reference teaches using a modified phyllosilicate, montmorillonites of the bentone for stabilizing the composition, and shows

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a formulation comprising 0.1-5% by weight of Bentone 38 (col. 3, lines 49-55; col. 4, lines 24-30; col. 9, line 55 to col. 10, line 14). The example shown in col. 8, lines 50-66 shows 0.5% by weight of alpha-tocopherol acetate, an antioxidant. The reference further teaches that flavonoids also can be used as an antioxidant, which provides the specific motivation to use flavonoids (col. 5, lines 41-46). The reference teaches using titanium dioxide treated with alkylsilane or aluminum hydroxide and stearic acid (col. 2, lines 1-37).

Plaschke et al. teach a flavonoid-containing sunscreen composition (abstract). The invention comprises at least one flavanone and at least one flavone, and is said to provide optimized UV-absorption profile (col. 2, line 21 to col. 4, line 62).

It would have been obvious to one having ordinary skill in the art at the time the invention was made to have modified the composition of Gers-Barlag by adding the phyllosilicate as motivated by Msika because both references teach cosmetic water-in-oil emulsion compositions. Msika et al. also teach the stabilizing effect of the phyllosilicates, therefore the skilled artisan would have had a reasonable expectation of successfully producing a stable emulsion. The skilled artisan would have been motivated to further add flavonoid as motivated by Msika et al. and Plaschke et al. because both teach suncreening compositions. Msika et al. teach that flavonoids as antioxidants are well known in the cosmetic art. Paschke et al. teach that flavonoid-containing sunscreen compositions provide optimized UV-absorption. The skilled artisan would have had a reasonable expectation of successfully producing a water-in-oil sunscreen composition with optimized UV protection.

Claims 13-20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Gers-Barlag et al., Msika et al., and Plaschke et al. as applied to claims 1-5 and 7-12 as above, and further in view of Suzuki et al. (US Patent 5,145,781).

The combined references fail to teach flavone as recited in claims 13-20. Suzuki et al. teach that alpha-glycosyl rutin has good water-solubility, resistance to light and stability to intact rutin (abstract). The reference teaches "alpha-glycosyl rutin is favorably usable as a yellowing agent, antioxidant, stabilizer, fading-preventing agent, quality-improving agent, preventive, remedy, UV-absorbent, and deterioration-preventing agent in . . . cosmetics including skin-refining agent and skin-whitening agent" (abstract). Examples B-9, B-13, B-14. and B-15 shows examples of topical compositions comprising alpha-glycosyl rutin. Example B-14 particularly teaches an emulsion.

Given the teaching of using flavone in a cosmetic composition in the combined references, it would have been obvious to one having ordinary skill in the art at the time the invention was made to have looked to the prior arts such as Suzuki et al. and have been motivated to use alpha-glycosyl rutin because of the expectation of successfully producing a cosmetic composition with UV protection, skin-refining and skin-whitening effects and enhanced stability.

(10) Response to Argument

Appellants argue that Gers-Berlag disclose zinc oxide or titanium dioxide particles that are not modified in the sense that the word "modified" is used in appellant's specification. Examiner interprets the claims as reading "modified

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phyllosilicate” in claim 1, which is disclosed in the Msika et al. reference. In response to appellant’s arguments against the references, one cannot show nonobviousness by attacking references individually where the rejections are based on the combination of references. See *In re Keller*, 642 F. 2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F. 2d 1091, 231 USPQ 375 (Fed. Cir. 1986).

Appellants argue that the Msika et al. does not teach or suggest an emulsifier-free emulsion. Examiner respectfully points to col. 2, lines 1-3 in the Msika et al. reference where the use of emulsifiers are not employed.

Appellants argue that Msika et al. does not use phyllosilicates to stabilize an emulsion. However, admission in appellant’s arguments (dated 1/20/2005, pg. 6, paragraph 1) is directed to the use of phyllosilicates (under the trade name Bentone 34, 38) in the Msika et al. reference. Appellants argue that the particular phyllosilicate, Bentonites, are not used in emulsions in the Msika et al. reference (col. 3, lines 49-55). Examiner respectfully points out that the paragraph before explicitly recites that the composition is provided in the form of water-in-oil emulsions (col. 3, lines 46-48).

Appellants argue that Plaschke et al. simply teaches compositions comprising flavanoids, which have nothing to do with emulsions, therefore having no reason to combine these references.

Examiner respectfully points out that Msika et al. use flavonoids in the composition because of its anti-oxidant properties (col. 5, lines 41-48). Furthermore, Plaschke et al. teach the benefits of using flavonoids and flavones as effective UV filters in sunscreen compositions (col. 2, lines 33-50). Thus, the motivation for using

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flavonoids or flavones in water-in-oil compositions is because both Msika and Paschke et al. teach sunscreen compositions. A skilled artisan would have had a reasonable expectation of producing a stable product with added anti-oxidant and UV-protection properties.

Examiner notes that the claimed invention is not limited to a liquid "emulsion," but to a system comprising an oil phase and a water phase wherein the water phase is finely dispersed in the oil phase. This reads on the "emulsion" stick and "emulsion" gel disclosed by Msika et al.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,



Yong S. Chong, Ph.D.
Patent Examiner
Art Unit 1617


ysc
February 11, 2006

Conferees:

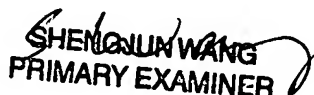
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